REC'D TEAM 11
NOV 14 2001
UNSCANNED
Supreme Court, U.S.
FILED
NOV 2 2001
CLERK

No. 01-283

IN THE

Supreme Court of the United States

STATE OF UTAH, *et al.*,

Appellants,

v.

DONALD L. EVANS, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Utah

REPLY TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
RAYMOND A. HINTZE
CHIEF CIVIL DEPUTY ATTORNEY GENERAL
J. MARK WARD
ASSISTANT ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114
(801) 538-1191

THOMAS R. LEE*
524 J. Reuben Clark Bldg.
Brigham Young University
Provo, Utah 84602
(801) 378-9024

CARTER G. PHILLIPS
GENE C. SCHAERR
MICHAEL S. LEE
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Appellants

* Counsel of Record

November 2, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THIS CASE PRESENTS SUBSTANTIAL QUESTIONS REGARDING THE APPLICATION OF THE CENSUS ACT AND THE CENSUS CLAUSE	1
II. THIS CASE PRESENTS SUBSTANTIAL QUESTIONS REGARDING THE INTERPRETATION OF THE "SUBSTANTIAL BURDEN ON RELIGION" INQUIRY UNDER THE RELIGIOUS FREEDOM RESTORATION ACT AND THE FREE EXERCISE CLAUSE	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Department of Commerce v. *United States House of Representatives*, 525 U.S. 316 (1999) 4
Employment Div., Dep't of Human Res. v. *Smith*, 494 U.S. 872 (1990) 8
Franklin v. *Massachusetts*, 505 U.S. 788 (1992) .. 1, 2, 5
Mockaitis v. *Harclerod*, 104 F.3d 1522 (9th Cir. 1997) 9
Thiry v. *Carlson*, 78 F.3d 1491 (10th Cir. 1996) ... 10

CONSTITUTION AND STATUTES

U.S. Const. art. I, § 2, cl. 3 2
amend. XIV, § 2 2
13 U.S.C. § 141(a) 2
42 U.S.C. § 2000bb-3(a) 9

OTHER AUTHORITIES

U.S. Dep't of Commerce, *Census 2000 Operational Plan* (Dec. 2000) 6

The statutory and constitutional questions that determine a State's representation in Congress and in the Electoral College are of paramount importance to a State and are surely "substantial." Appellees' Motions to Dismiss or Affirm fail to offer any persuasive reason why this Court should deny to the State of Utah the opportunity for full briefing and argument on the fundamental issue of whether it or North Carolina is legally entitled to an additional seat in Congress and in the Electoral College.

Indeed, the Motions merely highlight the need for plenary review. For example, rather than attempting to defend the district court's decision on its own terms, appellees repeatedly offer alternative (and erroneous) arguments in support of the result the court reached. Moreover, like the district court's opinion, the Motions flatly ignore Utah's textual objection to the Census Bureau's partial count of the overseas population, and likewise fail to address a series of vexing questions that necessarily flow from the district court's confusing attempt to justify the Bureau's decision on policy grounds. Thus, this Court should note probable jurisdiction and order full briefing on the merits.

I. THIS CASE PRESENTS SUBSTANTIAL QUESTIONS REGARDING THE APPLICATION OF THE CENSUS ACT AND THE CENSUS CLAUSE.

Appellees do not dispute that the decision below resolves significant issues regarding the proper application of the Census Act and the Census Clause that were left open by this Court's decision in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992). Indeed, the Solicitor General concedes that *Franklin* "does not squarely control the instant case." SG Mot. 24. Nor do appellees dispute that, without this Court's plenary consideration, the lower court's resolution of these issues will govern congressional apportionment in the future.

1. Like the district court, appellees never squarely address Utah's central textual argument: the Bureau's duty to count

the "whole number of persons" in the "population" precludes the Bureau from selectively enumerating isolated segments of the population and excluding others on grounds of political or pragmatic expediency. JS 3, 17-18; see U.S. Const. art. I, § 2, cl. 3; *id.* amend XIV, § 2; 13 U.S.C. § 141(a). If overseas federal employees are part of the "population" of their home states, then any overseas citizen who has retained ties to his home state also must be a member of the overseas "population" of that state, see *Franklin*, 505 U.S. at 806, and his membership in that "population" cannot turn on whether he happens to be on assignment for the federal government, as opposed to a private employer or a religious institution.

Appellees' silence on this issue is deafening. It confirms that there is no plausible construction of the governing statutory and constitutional requirement of an enumeration of the "whole number of persons" in the relevant "population" that would limit those terms to persons who happen to be employed by the federal government. Plenary review is warranted on this fundamental textual issue.

2. Appellees also fail to resolve the logical dilemma that plagued the district court's analysis of the constitutionality of the Bureau's action. On one hand, if the inclusion of federal employees who have "retained their ties" to their home States is consistent with "the underlying constitutional goal of equal representation," as *Franklin* suggests, *id.*, then the inclusion of LDS missionaries is similarly appropriate. The undisputed record below establishes that such missionaries have retained similar (if not stronger) ties to their home States and are similarly enumerable by reference to administrative records. See Pls.' Am. Statement of Undisputed Facts ("ASUF") ¶¶ 30, 54-56, *attached to* Pls.' Reply Mem. in Supp. of Summ. J., *Utah* v. *Evans*, No. F-2-01-CV-23B (D. Utah filed March 5, 2001).

Appellees make no effort to challenge Utah's showing on this point. Instead, they retreat to the notion that the inclusion

of LDS missionaries would be inconsistent with "[c]onsiderations of fairness and confidence in the integrity and political neutrality of the census." SG Mot. 17. In so arguing, however, appellees run headlong into the second prong of the logical dilemma noted above: if the selective inclusion of only one segment of the overseas population is unlawful, that defect also dooms the Census Bureau's arbitrary enumeration of only overseas federal employees.

The Bureau, in short, cannot have it both ways. If inclusion of overseas Americans who retain ties to their home states advances the constitutional goals of the census, LDS missionaries should be included in the apportionment count. On the other hand, if isolated segments of overseas Americans cannot be included because of concerns about neutrality or equality, federal employees must be excluded. At least one of these propositions must be true, and either of them would give Utah its fourth seat in the House. Again, neither the district court nor the appellees have offered any plausible way out of this quandary, and plenary review by this Court accordingly is in order.

3. North Carolina attempts to resolve this dilemma by echoing the district court's view—also advanced by the Bureau below—that the distribution of overseas federal employees is somehow representative of the total overseas population, or at least more so than that of LDS missionaries. See NC Mot. 19; see also JS App. 17a-18a. As noted in the Jurisdictional Statement, however, this is one of the most troubling aspects of the district court's decision. It would authorize the Bureau to use what amounts to statistical sampling in enumerating the overseas population, in violation of *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 334-43 (1999). See JS 16-18.

To his credit, the Solicitor General now concedes the incorrectness of the district court's analysis of this point,

noting that "[t]he fact that federal personnel stationed overseas are in some sense representative of the total United States population is not . . . a sufficient ground for including them in the count." SG Mot. 23. Unfortunately, however, the Solicitor General's concession is not binding on the Bureau. Accordingly, unless this Court reviews the decision below, the Bureau will be left with the discretion to enumerate the overseas population by means of the statistical sampling method that this Court has already held unlawful.[1]

4. Appellees do not dispute that the district court's interpretation of *Franklin* would authorize the Bureau to discriminate among groups of overseas Americans based on arbitrary and non-textual considerations such as the relative "contributions" that those groups make to their country. See JS 15, 20-21. Instead, the Solicitor General attempts to buttress the decision below by citing other factors that are equally arbitrary and non-textual—such as the fact that overseas federal employees have more "enduring tie[s]" to their country and "often live or work in areas" where they are subject to extensive regulation by the federal government—that he believes distinguish LDS missionaries from overseas federal employees. SG Mot. 20. Those factors, however, are simply irrelevant. They pertain only to the employees'

---

[1] Appellees also point to the fact that the distribution of LDS missionaries is skewed in favor of one particular State, or at least more so than the distribution of overseas federal employees. *See* NC Mot. 19; SG Mot. 17. But that fact can hardly serve as a basis for summary affirmance, particularly since neither the district court nor appellees have ever explained how the Bureau could fairly determine the degree to which enumerating one component of the overseas population may inure to the benefit or detriment of "one state, or a group of states," JS App. 18a, without implicating the Census Clause or the Census Act. *See* JS 23. Thus, the fact that different segments of the overseas population are distributed differently among the States only underscores the need for this Court to decide whether, and under what circumstances, the Bureau may validly enumerate only one of those segments while consciously excluding others.

connection to the federal government, not to whether they have "retained their ties *to their home States*," *Franklin*, 505 U.S. at 806 (emphasis added), and thus can be identified and allocated to their respective States under this Court's decision in *Franklin*.

All Americans overseas who may be eligible for inclusion in the apportionment count are by definition United States citizens. The question, therefore, is not whether they have sufficient ties to their country, but whether their ties to their home *States* permit them to be treated as usual residents of those states for apportionment purposes. The Solicitor General's argument thus boils down to a standard of absolute, unfettered discretion for the Bureau to enumerate or exclude any segment of a population that it may choose. Plenary review is necessary to forestall that unlawful result.

5. Like the district court, appellees also argue that overseas federal employees are entitled to special treatment in the census because they are supposedly easier to enumerate than most other Americans living overseas. See SG Mot. 21. But appellees' reiteration of this argument suffers from the same infirmities that plagued the district court's opinion. Indeed, appellees have all but ignored undisputed evidence that, based on records maintained by the LDS Church, LDS missionaries can be identified and allocated to their respective home States with at least the same degree of accuracy as overseas federal employees. See JS 19-20.[2]

---

[2] Appellees are also incorrect in contending that "the integrity of the census would be compromised if the task of enumerating subsets of the population were effectively delegated to private organizations." SG Mot. 22. The Bureau's own publications show that it already relies on records maintained by private organizations in conducting the decennial census. For example, the Bureau uses private records to enumerate individuals living in privately operated group homes (*e.g.*, retirement homes, etc.), private prisons, and dormitories. *See* U.S. Dep't of Commerce, *Census 2000 Operational Plan* IX-4 to IX-5 (Dec. 2000).

6. Appellees also argue that Utah lacks standing to pursue *one* form of the remedy sought in its Second Amended Complaint. Specifically, they argue that Utah cannot demonstrate that it would be entitled to a fourth Representative if the Bureau conducted a complete enumeration of all Americans residing temporarily overseas on April 1, 2000, and that the State therefore lacks standing to pursue such relief. This argument fails for three reasons.

First, it mischaracterizes the nature of the relief sought by the State of Utah. Utah is not asking for a new census. Rather, as discussed above and in the Jurisdictional Statement, Utah seeks an order declaring that the Bureau's disparate treatment of similarly situated components of the overseas population is unlawful, and directing that the Bureau adjust the apportionment count accordingly. See SG Mot. App. 19a-20a. The Bureau might make such an adjustment by excluding overseas federal employees,[3] or by including others (like LDS missionaries) who may be similarly situated, but Utah has never sought a broad recount of the full overseas population.

Second, the Solicitor General's standing argument incorrectly assumes that Utah failed to produce adequate evidence "to support the[] premise that the population of United States nationals residing abroad is . . . distributed" in such a way that a complete enumeration of that population would entitle Utah to a fourth Representative. SG Mot. 15.

---

[3] The Solicitor General's only remaining objection to this exclusion is the unexplained assertion that it somehow would be "wholly disproportionate" at this date. SG Mot. 18. Without more, it is difficult to know what standard of "disproportionality" the Solicitor General has in mind (and that unanswered question alone merits plenary consideration), but this much is clear on the undisputed record below: the Bureau's partial count of the overseas population affected only Utah and North Carolina (and no other States), and in that sense the exclusion of overseas federal employees would be precisely tailored to offset the bias produced by the Bureau's discriminatory count.

In fact, Utah *did* produce empirical evidence to that effect, and it was the only party to produce such evidence below.[4]

Third, in any event, this standing argument was implicitly rejected by the district court. Accordingly, it has never been fully addressed on the merits and is not an appropriate basis for summary affirmance.

II. THIS CASE PRESENTS SUBSTANTIAL QUESTIONS REGARDING THE INTERPRETATION OF THE "SUBSTANTIAL BURDEN ON RELIGION" INQUIRY UNDER THE RELIGIOUS FREEDOM RESTORATION ACT AND THE FREE EXERCISE CLAUSE.

As shown in the Jurisdictional Statement, the district court also made a fundamental error in assuming that, to establish a "substantial burden" on religion, a RFRA or Free Exercise plaintiff must prove that he was *personally* deterred or discouraged by the government action at issue from engaging in a religious practice. Appellees' own treatment of this issue confirms that it presents a substantial federal question.

1. Instead of attempting to defend the district court's decision on its own terms, the Solicitor General begins by offering alternative bases for the result below. Joined by North Carolina, he argues that the burden imposed by the

---

[4] Specifically, Utah submitted empirical evidence showing that it would be entitled to a fourth Representative if the Bureau expanded the apportionment count to include not only overseas federal employees, but also college students studying abroad, LDS missionaries, and all other Americans living abroad on April 1, 2000. *See* Wolfson Decl. ("Wolfson II") ¶¶ 28-35 (Mar. 5, 2001); ASUF ¶¶ 38-39. Moreover, Utah's statistician and demographer provided a scientific explanation—based in part on empirical data obtained from the Bureau, *see* Wolfson II ¶ 32—for her expert opinion that an attempt to enumerate all such persons would have resulted in Utah obtaining a fourth Representative. *See id.* ¶¶ 30-34. Neither the federal defendants nor North Carolina offered any evidence to rebut Utah's evidence on this point.

Bureau's policies—*i.e.*, the loss of a fourth Representative—is not unique to the missionary plaintiffs, "but is shared equally by all other persons" who claim Utah as their place of permanent residence. SG Mot. 28. That fact, appellees argue, makes it impossible for the missionary plaintiffs to establish that the Bureau's enumeration practices impose a substantial burden on the free exercise of their religious beliefs. *Id.* at 25-28; NC Mot. 29.

Appellees cite no support for this novel restriction on a plaintiff's ability to establish a substantial burden. And any such restriction would be unwarranted. The mere fact that a government-imposed burden on the free exercise of religion may inflict collateral damage—even substantial damage—on others does not make the burden insubstantial.

If the decision below stands, the missionary plaintiffs and others who may be similarly situated will have to live with the fact that their absence from the country on religious business cost their home State an additional Representative and an additional vote in the Electoral College for the next decade. The fact that their missionary service has now imposed enormous costs on their entire State, in addition to denying them the personal benefits they might have received from additional representation, makes the burden more, not less, substantial.[5]

The Solicitor General's argument, moreover, would improperly insulate census decisions from review under RFRA.

---

[5] Appellees also attempt to defend the district court's decision rejecting appellants' free exercise claims on the alternative ground that the Bureau's policy is neutral and generally applicable, and therefore falls within the "safe harbor" of *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872, 879-80 (1990). Appellants thoroughly refuted this argument in their briefs before the district court, and appellees do not respond to that analysis in their motions. *See* Pls.' Reply Mem. in Supp. of Summ. J. at 65-69, *Utah* v. *Evans*, F-2-01-CV-23:B (D. Utah filed Mar. 5, 2001).

The impact of a census decision can *only* be felt collectively. Yet RFRA's protective scope extends to "*all* Federal . . . law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a) (emphasis added). The statute's protection is thus not limited to government actions that are capable of inflicting a highly individualized injury. Accordingly, the Solicitor General's alternative argument merely highlights the need for this Court's review.

2. Appellees also make a half-hearted attempt to defend the district court's conclusion that the individual appellants failed to present sufficient plaintiff-specific evidence that the Bureau's decision "'burdened, or even tended to burden or coerce, [any appellant's] free exercise of his religious belief in the performance of missionary work.'" SG Mot. 29. Like the district court, however, appellees cite no case law for the proposition that a substantial burden on religion can be established only through evidence that the plaintiff *himself* was "coerced" in some manner that deterred or "tended" to deter him from pursuing a religious practice. Nor do they address the case law cited in the Jurisdictional Statement, see *Mockaitis* v. *Harclerod*, 104 F.3d 1522 (9th Cir. 1997), which shows that the district court was wrong to require such plaintiff-specific evidence. See JS 25-27.

Instead of addressing this issue head-on, the Solicitor General attempts to recharacterize the issue as whether "a plaintiff must actually forego religious exercise in order to assert a valid RFRA claim." SG Mot. 29. In fact, a close reading of the district court's opinion suggests that this is precisely the standard it applied. See, *e.g.*, JS App. 10a-11a. But regardless of whether the district court's opinion can fairly be read to require that a plaintiff forgo a religious exercise, there can be no doubt that the district court's decision requires plaintiff-specific evidence of coercion that

would at least "tend" to encourage that result. That is the core ruling challenged by the appellants here.[6]

Nor can there be any doubt that appellants would prevail under the proper standard. Appellees do not dispute (1) that the missionary plaintiffs were serving overseas on April 1, 2000, (2) that their presence abroad was compelled by sincere religious belief, (3) that their exclusion from the 2000 census was the direct result of their decision to act on that belief, or (4) that the Bureau's failure to count them (and others like them) resulted in their State being allocated one fewer Representative, and one fewer vote in the Electoral College. Under those circumstances, it cannot be denied that the Bureau's practices have a general "'*tendency* to coerce individuals into acting contrary to their religious beliefs,'" *Thiry* v. *Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (emphasis added) (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). The district court's failure to apply the correct standard—and its error in requiring plaintiff-specific evidence of coercion—therefore raises a substantial question that merits this Court's review.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction and reverse the judgment of the district court.

---

[6] North Carolina incorrectly suggests that, during a summary judgment hearing before the district court, "appellants conceded . . . that they had no" evidence indicating that any plaintiff's religious liberties were substantially burdened. NC Mot. 4. Appellants made no such concession. Rather, appellants simply conceded that there was no evidence that any individual missionary considered, at the outset of his service, the possibility that he would not be counted in the 2000 census. *See* NC App. 13a.

Respectfully submitted,

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
RAYMOND A. HINTZE
CHIEF CIVIL DEPUTY ATTORNEY GENERAL
J. MARK WARD
ASSISTANT ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114
(801) 538-1191

THOMAS R. LEE*
524 J. Reuben Clark Bldg.
Brigham Young University
Provo, Utah 84602
(801) 378-9024

CARTER G. PHILLIPS
GENE C. SCHAERR
MICHAEL S. LEE
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Appellants

November 2, 2001

* Counsel of Record